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Chairman: Mr. Dhakal (Vice-Chairman) ..... (Nepal)

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In the absence of Mr. Bennouna (Morocco), Mr. Dhakal (Nepal), Vice-Chairman, took the Chair.

The meeting was called to order at 2.40 p.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (A/59/10) (*continued*)

1. **Mr. Henczel** (Poland), referring to chapter V of the report of the International Law Commission (A/59/10), said he would deal with the issues that the Special Rapporteur on responsibility of international organizations intended to address in his third report, due in 2005. On the question of breach of an international obligation, he said that relations between an international organization and its member States were mostly governed by the rules of the organization. It should be borne in mind, however, that the organization itself and its member States were separate subjects of international law. Moreover, the ties between the organization and its member States could be relatively loose. Thus, the law of international organizations could not, in many cases, be defined as a self-contained regime. Under those circumstances, the law of responsibility would often play at least a subsidiary role in the relations between the organization and its member States. Therefore, it seemed justified that breaches of obligations that an international organization might have towards its member States or its agents should be considered by the Commission in its study.

2. On the question of circumstances precluding wrongfulness, he said that the international legal concept of the state of necessity was strictly connected with the international position of States, and not with that of international organizations. Although in some situations the activities and essential interests of the organization might be threatened by a grave and imminent peril, the position of the organization could not be compared with the position of States, for example, in respect of the consequences of a possible disappearance of the organization. Therefore, his delegation suggested that the report should omit the st. of necessity as a circumstance precluding wrongfulne s.

3. On the matter of the responsibility of an international organization in connection with a wrongful act of a State or another organization, the Polish delegation was of the opinion that when the international organization was requesting a member State to undertake specific conduct, the responsibility for breaches of international law should be attributed to that organization if, according to the rules of the organization, compliance with such a request was mandatory for member States. The situation seemed slightly different in cases where the organization authorized member States to act but did not impose upon them any particular conduct. He referred in that respect to the practice of the European Court of Human Rights relating to the control of acts of States in implementation of European Community law.

4. **Mr. Dolatyar** (Islamic Republic of Iran) referred to paragraph 25 of the report, in which the Commission sought views and comments from Member States. Draft article 3 (2) cast light on some aspects of the question of the responsibility of a member State and an international organization when the State acted in compliance with a request or authorization of the organization and the conduct appeared to be in breach of an international obligation of both the State and the organization. Cases in which an international organization gave authorization to its member States for certain conduct should be differentiated from those in which the organization requested them to engage in such conduct. By authorizing a member State, the organization conferred on it a right to become involved in a situation. In such cases, the authorized State was exercising a right, not an obligation or a duty, to take action. Consequently, its conduct should be considered its own rather than that of the organization. During the past decade there had been a number of cases in which the United Nations Security Council had authorized Member States to take measures in respect of certain situations. In no case had the United Nations been held responsible for actions that a Member State had taken under that authorization.

5. With regard to the attribution of conduct, draft article 4 articulated a general rule that governed both acts and omissions. That was in conformity with the provision of draft article 3 (2), which pointed out that conduct consisted of an action or omission. Though identification and attribution of cases of omission seemed more difficult, for the sake of clarity, the phrase "or omissions" should be inserted after the word "acts" in draft article 4 (1).

6. His delegation agreed with the content of draft article 5. Noting that the Commission had not given any definition of "effective control", he suggested that

the relevant provisions of the Commission's draft articles on State responsibility could be helpful in that regard.

7. **Mr. Abraham** (France) said that his delegation had no difficulties with the draft articles on responsibility of international organizations. Draft article 4 provided that the rules of the organization should not be the only criterion for determining the functions of its organs and agents. The definition of "rules of the organization" was based on, and supplemented, the definition contained in article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That definition and the definition of agent were both broad and specific enough to allow for different situations in which conduct might be attributed to an organization.

8. Draft article 5 dealt with an issue that might pose the greatest problem in terms of attribution. As noted in the commentary, the draft envisaged the case of military contingents that a State placed at the disposal of an international organization, such as the United Nations, for a peacekeeping operation. The Commission had settled on effective control as a criterion for attribution of conduct, and that would appear to be the most sensible approach. It was, however, important not to overlook the differences of interpretation which might arise in that connection. The adoption of draft article 5 did not resolve all the issues involved. The Special Rapporteur and the Commission should explore the subject in greater depth.

9. According to the commentary, draft article 6 dealt with conduct that might exceed the competence of the organization, not just that of the subsidiary organ. He wondered whether it might not be preferable for that point to be expressly stated in the draft article, particularly since draft article 4 referred to the rules of the organization, including "decisions, resolutions and other acts taken by the organization in accordance with those instruments".

10. Draft article 7 mirrored, mutatis mutandis, the wording of article 11 of the draft articles on State responsibility and did not present any particular problem. The commentary noted that in certain instances of practice, it might not be clear whether what was involved by the acknowledgement was attribution of conduct or responsibility. If it was necessary to make a clear distinction between attribution of conduct and attribution of responsibility, it was important to stress that the responsibility of an international organization was at issue because conduct involving a breach of an international obligation might be attributed to it. In the cases mentioned by the Commission, the attribution of responsibility reflected the conviction of the international organizations that the conduct in question could, at least partly, be attributed to them.

11. Turning to the issues on which the Commission requested the views of States, he said that the question of breaches of the law of the organization should not be excluded from the Commission's work, even though the scope of its work in that area would obviously be limited by the primacy of *lex specialis*.

12. Concerning the transposition of article 25 of the draft articles on State responsibility, on state of necessity, his delegation did not see any reason that would justify the decision to eliminate the circumstance precluding wrongfulness or to make it contingent upon other conditions. Nevertheless, as in the case of States, circumstances that might make it necessary to invoke necessity would rarely occur in practice.

13. The Commission had also asked whether an international organization could be held responsible in the event that a certain conduct which a member State took in compliance with a request on the part of the international organization appeared to be in breach of an international obligation both of that State and of that organization. The question was a complex one and could not be answered as easily as one might think. If the international organization merely authorized the conduct of the State that constituted a breach of their international obligations, the responsibility of each one should be assessed separately. The question also arose as to whether the authorization by the organization might not in itself be a breach of its obligations and whether the wrongfulness of the State's conduct could be excluded based on the authorization it had received, which he doubted. In cases where the organization requested the State to adopt the wrongful conduct, the responsibility of one or the other would depend to a large extent on how much latitude the State was allowed by the organization's request.

14. **Mr. Panevkin** (Russian Federation), referring to chapter VI of the report, said that he concurred with

the conclusion of the Special Rapporteur that further study of the topic was needed, particularly given the problem of ascertaining the existence of groundwaters that were not connected with surface waters and therefore did not fall under the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. The scarcity of State practice had made it difficult for the Commission to gather information from States on the issue. In agreements on the protection and use of transboundary watercourses between the Russian Federation and neighbouring States, for example, the question of such groundwaters had not been addressed specifically. His delegation would be submitting to the Commission its replies to the questionnaire circulated by the Secretariat on 23 September 2004.

15. In deciding to drop the notion of "confined transboundary groundwaters", the Special Rapporteur had chosen the right approach to the topic by focusing largely on the Convention. The Convention on Protection and Use of Transboundary Watercourses and International Lakes should also be taken into account, even though it was regional in nature, as it established several basic principles for the protection and use of transboundary watercourses regardless of whether they were surface waters or groundwaters.

16. In cases where the groundwaters in a given study had special characteristics, such as non-renewable transboundary aquifer systems, there was a need for further analysis of the concept of "transboundary harm" put forward in the draft articles. It was unclear, for example, whether transboundary harm was caused where a single neighbouring State lowered the volume of water in a shared aquifer system through use within its territory or where States used the resources of the aquifer system to varying degrees.

17. Regardless of the outcome of the Commission's work on the topic, the results should be in the form of a framework. They might serve as a guideline for States in concluding bilateral and regional agreements.

18. **Mr. Buhler** (Austria) said that his delegation had doubts as to whether the definition, in draft article 4 of the term "agent" as a person "through whom the organization acts" was a workable definition in the legal sense. If the conduct of an agent could be attributed to an international organization, the latter was acting "through that person". The phrase "through whom the organization acts" identified the legal consequences of the attribution of conduct, but did not define the term "agent". For that reason, paragraph 2 should be based on the full wording of the relevant definition given by the International Court of Justice in its advisory opinion on "Reparation for injuries suffered in the service of the United Nations", not only on the short version in the final part that was mentioned in the commentary on draft article 4. Therefore, draft article 4 should be based on article 5 of the articles on State responsibility rather than on article 4. The definition could thus be formulated as follows:

> "An 'agent' or 'organ' of an international organization is a person or entity that has been charged by that organization with carrying out, or helping to carry out, one of its functions, provided the agent or organ is acting in that capacity in the particular instance."

19. In comparison to article 6 on State responsibility, current draft article 5 on responsibility of international organizations contained a different criterion for the attribution of conduct. The decisive criterion in article 6 on State responsibility was the exercise of elements of governmental authority of the State at whose disposal the organ was placed. In current draft article 5, the criterion was effective control over conduct. It might be asked whether the criterion of control was enough or whether the exercise of functions of the organization should be included as an additional criterion.

20. Furthermore, draft article 5 was limited to organs of a State or organs or agents of another international organization, but did not include private persons. It was unclear, however, whether or not the act of a private person acting under the effective control of an organization would entail the organization's responsibility. He wished to know what the reason might be for excluding the situation of private persons acting in such a way. If, for instance, a person in the service of a non-governmental organization acted under the effective control of the United Nations in the course of a peacekeeping operation, such an act would certainly be attributable to the United Nations. It was difficult to see any distinction between such a case and a situation where a State organ was acting in such a manner.

21. An answer could, of course, be sought in the formulation of draft article 4, according to which an

agent was any person through whom the organization acted. That would, however, also apply to foreign State organs. But if foreign State organs (who were persons) were not covered by draft article 4, private persons who only incidentally acted under the effective control of an organization would likewise not be covered by draft article 4. It seemed that draft articles 4 and 5 needed harmonization in order to cover all possible situations. In that context, consideration might be given to adopting the approach taken in draft article 8 on State responsibility, which referred to the situation of control but was not limited to foreign State organs.

22. Turning to the questions posed by the Commission to member States (A/59/10, para. 25), he said that with regard to question (a), concerning the interrelations between an international organization and its member States or its agents, Austria believed that the Commission should not consider breaches of obligations that an international organization might have towards its agents, since that would rather be a matter of internal administrative law. However, the Commission should include general rules of responsibility for cases in which an organization breached obligations towards its member States. The legal consequences of an ultra vires act of an international organization towards its member States could be of special concern. A second crucial issue concerned the legal consequences of the conduct of member States within the organs of the responsible organization.

23. Regarding question (b), it should be noted that owing to a lack of practice with respect to the state of necessity of an international organization, any future draft article would be based on purely theoretical grounds. However, his delegation saw no reason why a provision on necessity should not be included in the draft articles.

24. As to question (c), his delegation was of the view that an international organization could be held responsible under international law if it requested a member State to perform a specific act in violation of international law. Whereas the responsibility of the member State was linked to the attribution of the violating act, the responsibility of the international organization was linked to the attribution of the request to perform the act in question. In that context, the difficult question would be whether an international organization could be held responsible for a request or an authorization in cases where the request or authorization was not prohibited by the international obligation in breach. Certainly, from the perspective of justice, an international organization should not be allowed to escape responsibility by "outsourcing" its actors.

25. Turning to the topic of shared natural resources (A/59/10, chap. VI), he said that Austria regarded the general framework presented by the Special Rapporteur as a good starting point for the further work of the Commission. Austria agreed with the Special Rapporteur that the term "aquifer" should be used instead of "confined transboundary groundwaters". To limit the scope of the articles to "transboundary aquifers" seemed reasonable, although his delegation would welcome more information from technical experts on the viability of the concept in view of the factual nature of "aquifers". The concept of "exploitability", to which draft article 2 (a) referred, raised a number of questions, such as the existence of the technical capabilities to "exploit" aquifers. Therefore, Austria suggested that the word "exploitable" should be either deleted or defined more precisely.

26. It was essential that States should try to acquire information about the factual nature of "aquifers" which they were using or intended to use. That need to acquire information should be reflected in the general principles in Part II. Draft article 7 on the relationship between different kinds of uses was in line with the careful compromise reflected in article 10 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

27. With regard to the relationship between the 1997 Convention and any international instrument concerning groundwater, his delegation believed that it was too early to discuss the question, as it would depend very much on the content and legal form of the draft articles. His delegation agreed with the Special Rapporteur that a decision on the legal form should only be taken once the content had become more precise.

28. Moreover, the formulation of universal rules by the Commission was to be seen as providing guidance for regional arrangements. It would then be up to the States to enter into regional arrangements which took into account the specific characteristics and circumstances of regional aquifers.

29. **Mr. Wickremasinghe** (United Kingdom) said that it remained to be seen whether the Commission's decision to model the draft articles on responsibility of international organizations after its successful work on the topic of State responsibility was appropriate. His delegation had suggested that the Commission should step back, take stock of existing law and practice in that area, and explore some of the particular problems related to the effort to codify the law of international organizations.

30. The attempt to deal with organs of an organization and its agents in the same provision (draft article 4 (1)), while understandable, had led to a lack of clarity; in relation to the conduct of agents, the words "in his or her official capacity" might be a clearer basis for attribution than "in the performance of the functions".

31. The commentary on draft article 5 suggested that the test of "effective control" was based largely on practice relating to peacekeeping operations; that test might not be appropriate to the breadth of situations to which the draft article potentially applied.

32. With respect to the issues raised in paragraph 25 of the report, he suggested that the Commission should keep an open mind on the scope of its work in relation to an international organization's responsibility to its member States or its agents for breaches of its own internal law; there could be significant practice in that area which might provide guidance on the handling of external obligations.

33. There could be no simple, generally applicable answer to the question of an international organization's responsibility for the conduct of a member State that was requested or authorized by that organization in violation of an obligation owed by both the organization and the member State; much would depend on the organization in question and on the circumstances.

34. With regard to the topic of shared natural resources, the United Kingdom had considerable experience with transboundary resources other than groundwaters, in relation to which solutions were often found on a case-by-case basis.

35. Turning to the topic of reservations to treaties (A/59/10, chap. IX), it was difficult to define objections to reservations by their effects before undertaking substantive work on the effects of reservations. The current definition did not fully convey the contractual nature of the process of making reservations and objections; however, it could be used as a working draft and revised, if necessary, at a later stage.

36. His delegation continued to have doubts regarding the inclusion of the draft guideline on widening the scope of reservations for the same reason that it would oppose the inclusion of a draft guideline on late reservations; it was not clear how the draft guidelines would really discourage such practices.

37. Lastly, the United Kingdom reserved its position regarding the outcome of the Commission's work on the fragmentation of international law, while looking forward to seeing how that work developed in the future.

38. **Mr. Tavares** (Portugal) stressed that the draft articles on the responsibility of States for internationally wrongful acts could provide only a starting point for the Commission's study of the topic of responsibility of international organizations; such organizations were subjects of international law which differed from States in several respects, including their greater degree of diversity and the types of relations that could be established between them and their member States.

39. His delegation had doubts regarding the inclusion of the phrase "whatever position the organ or agent holds in respect of the organization" in draft article 4 (1), since it was clear from (2) and (3) that the position would be defined in the rules of the organization.

40. In draft article 4 (4), the words "decisions and resolutions" were unnecessary; a single reference to the "acts of the organization" would suffice. It was also doubtful that the reference to "established practice" was appropriate, since the activities and powers of an international organization depended upon its purposes and functions, as specified in its constituent documents. The current wording of (4), which could suggest that an organization's established practice was relevant to the creation of customary rules *contra legem*, should be replaced by the following: "For the purpose of the present draft article, 'rules of the organization' means the constituent instruments and other acts taken by the organization in accordance with those instruments".

41. With respect to draft article 5, he was concerned at the lack of references to established practice or customary law in support of the idea that an organ of a State could be at the disposal or under the effective control of an international organization; he would prefer to speak only of agents of international organizations. Moreover, as the Special Rapporteur had noted, established practice focused on attribution of responsibility rather than attribution of conduct (A/59/10, para. 72 (3)).

42. Lastly, his delegation would prefer to delete article 7, as it was an instance in which a rule that made sense in the context of States was inconceivable in the context of international organizations. An act which was not attributable to an organization under international law could not be attributed to it by other means, including the organization's own will.

43. **Ms. Kamenkova** (Belarus) said that the rules on attribution of conduct of international organizations were of fundamental significance for successful work on all topics relating to the responsibility of international organizations. The most successful of the draft articles was article 4, which provided a general rule on attribution of conduct to an international organization in the context of the conduct of the organ or agent of the international organization. Her delegation commended the inclusion of the terms "agent" and "rules of the organization" in that article. In future, such definitions should be moved to article 2 on use of terms, because they could be used in other draft articles. In particular, the term "rules of the organization" might be very useful in drafting rules on the responsibility of an international organization in connection with the wrongful act of a State or another organization. The term "agent" covered a very wide variety of categories of natural and legal persons or entities entrusted with the functions of the international organizations.

44. In draft article 5, there was a need for a clear definition of the term "effective control" as a criterion for attribution to an international organization of the conduct of a State organ that was placed at the disposal of the organization, such as national contingents for peacekeeping. The third report of the Special Rapporteur must give particular attention to drafting proposals to establish the further responsibility of an international organization for wrongful acts of member States if they were committed under the international organization's direction or effective control. The authorization by international organizations of conduct not under their direction or effective control did not exonerate them from responsibility for the commission of wrongful acts. However, in such cases, the main responsibility rested with the States directly involved in the commission of internationally wrongful acts. Strengthening such rules in the draft articles might promote a more thorough and balanced international legal evaluation of decisions taken on urgent international matters in the framework of international organizations, in particular the decisions of the Security Council.

45. There was no need to strengthen the notion of "absolute necessity" as a circumstance precluding wrongfulness. Invoking the necessity for an international organization to commit internationally wrongful acts in order to safeguard an essential interest against a grave and imminent peril could result in ambiguity and in unprincipled interpretations of the nature and motives of those acts. International organizations must be put in a much stricter international legal framework, in terms of responsibility, than States because they were multilateral institutions whose actions had particular significance for confirming the supremacy of law in international relations.

46. **Ms. Escobar Hernández** (Spain) endorsed the Commission's decision to model the draft articles on responsibility of international organizations after the draft articles on responsibility of States for internationally wrongful acts. She welcomed the seven draft articles on the first topic that the Commission had adopted thus far and urged the Commission to continue to involve international organizations in its work.

47. Turning to the issues on which comments had been requested from Governments, she said that while it might initially appear that the Commission should include in its consideration of responsibility of international organizations, breaches of an international organization's obligations towards its member States or its agents, the boundaries of that issue must be clearly defined.

48. First, it was important to take into account the organization's relationship with its member States and its agents. Second, such breaches would normally be addressed by the organization's own rules, and it must be determined whether any legal consequences could be extrapolated from the nature and scope of that

obligation. Third, the question of whether the organization had independent tribunals or other mechanisms for establishing the consequences of a breach of its obligations, without the necessity of recourse to other rules or mechanisms of general international law, must be considered. Any attempt to address the issue without taking those factors into account could damage the complex mechanism governing the activities of international organizations.

49. While her delegation was not, in principle, opposed to the possibility of an international organization's invoking a state of necessity, it was essential to conduct a full study of the practice of such organizations before taking a decision in the matter.

50. The question of whether an international organization should be regarded as responsible for a member State's conduct might depend on whether that conduct had been requested or merely authorized by the organization. It would appear that, in either case, the organization would be held responsible for the breach because of its involvement in the chain of circumstances that led to it. However, in the light of the serious consequences of such a conclusion, the Special Rapporteur should conduct a study of practice in that area.

51. **Ms. Ow** (Singapore) endorsed the phased approach to the topic of responsibility of international organizations, beginning with the establishment of a set of criteria for the attribution of conduct. She agreed that it was unnecessary to replicate the issues addressed in articles 9 and 10 of the articles on State responsibility in the context of international organizations.

52. Her delegation concurred with the general thrust of draft articles 4 and 6 and of the commentary thereon, which reflected the practical realities of international organizations and were sufficiently flexible to take into account the varying functions and structure of such organizations.

53 It would be useful to examine draft article 5, which was relevant to military contingents placed at the disposal of the United Nations for peacekeeping operations, in relation to troop contribution agreements, the responsibility of the contributing State and international humanitarian law. In that context, the question of attribution of conduct might be better considered in conjunction with that of attribution of liability; the issue would benefit from further discussion.

54. As there was little jurisprudence concerning the issue of conduct acknowledged by an international organization (draft article 7), it might be necessary to consider how such a scenario was likely to arise, the policy considerations militating for and against such a principle and the relationship between draft article 7 and draft articles 4 and 6.

55. Turning to the issue of the future work of the Commission, she endorsed the topics which the Special Rapporteur planned to address in his third report (A/59/10, para. 25). On the topic of breach of an international obligation, the study could usefully draw on the analogous principles set forth in chapter III of the articles on State responsibility. Moreover, it was equally important that any obligations which an international organization was alleged to have breached be shown to have been recognized and accepted by the international community.

56. Her delegation doubted that breaches of an international organization's obligations towards its member States or its agents should be included in the scope of the study. There was no international consensus on the legal nature of an organization's rules in relation to international law. Moreover, variations in the nature and functions of different organizations might not lend themselves to a study of that type.

57. On the question of circumstances precluding wrongfulness, it would be useful to explore the context in which such a rule might be applicable and the specific principles which might be invoked. for instance, the question of whether a state of necessity, similar to that cited in article 25 of the articles on State responsibility could be invoked vis-à-vis an international organization remained to be clarified; the same was true for the question of how the reference to "the only way for the State to safeguard an essential interest against a grave and imminent peril" could be appropriately transposed to an international organization. She wondered whether there was a common understanding of what constituted such a peril to an international organization and whether that notion was even relevant to such entities.

58. Other issues which would need to be considered included the extent to which a member State's act was requested or authorized by an international organization and the degree of control, if any,

exercised by that organization. What remained critical was the link to a clear obligation which would be violated if the conduct was performed by the organization itself.

59. **Mr. Kendal** (Denmark), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), and referring to the topic of responsibility of international organizations, said that the Nordic countries fully shared the points made by the representative of the Netherlands on issues relating to the European Community.

60. The Special Rapporteur had received useful submissions on the practice of international organizations and the descriptions of practice in his report were crucial in providing an overview of the subject and establishing the practical framework for the Commission's work. The diversity of international organizations was a key challenge in the process of producing a coherent set of draft articles, and more of those organizations should be encouraged to provide information on their practice.

61. In draft article 4, paragraph 4, the Commission had opted to use the term "established practice" when defining "rules of the organization". While agreeing that practice was relevant when seeking to determine the organs or agents that acted on behalf of an organization, the Nordic countries questioned whether the article as drafted reflected the Special Rapporteur's thinking about the use of the term "established".

62. In draft article 5, the criterion of whether the organization exercised effective control over the conduct of organs placed at the disposal of an international organization by a State or another international organization would seem correct in the case of peacekeeping and other military operations. However, it appeared to be less adequate for deciding attribution in the case of other types of cooperation between international organizations and States or other international organizations, and it might be useful for the Commission to take a closer look at other such types of cooperation and their relevance for defining the criteria for attribution.

63. Draft article 5 also related to the case of troop-contributing countries retaining criminal jurisdiction over troops and the relevance of the question of "effective control" and hence attribution. Even though that meant that contributing States retained certain powers, he cautioned against placing too much emphasis on determining the question of effective control of conduct. The framework for establishing individual responsibility for acts was, to some extent, governed by different criteria than the framework for deciding attribution of conduct to either an organization or a State.

64. As to the questions that the Commission had addressed to Governments (A/59/10, para. 25) with regard to question (a), the Nordic Group agreed that it was not easy to define precisely the nature of "rules of the organization" under international law, since they covered a wide range of norms and practices. It followed from draft article 3, however, that every breach of an international obligation by an international organization in principle entailed the latter's responsibility. Consequently, it could not be excluded that an organization's breach of the "rules of the organization" vis-à-vis a member State might entail its responsibility.

65. The issue of necessity addressed in question (b) merited further study. It was possible that the "essential interests" of an organization could be identified; thus, the safeguarding of such interests should, as in the case of the rules on State responsibility, preclude wrongfulness.

66. Lastly, question (c) introduced a distinction between the responsibility of an organization for the conduct of a member State when the organization requested, as opposed to authorized, such an action. As in the case of the "effective control" criteria in draft article 4, it appeared essential to find the point where the member State could be said to have so little "room for manoeuvre" that it would seem unreasonable to make it solely responsible for certain conduct. It was also important to focus on the actual situation leading to the act or omission entailing responsibility, as well as the more formal question of whether a resolution used the expression "authorize" or "request", or any other term, including when an organization, through a binding decision, obliged the member State to act.

67. **Mr. Aljadey** (Libyan Arab Jamahiriya) said that adherence to the condition that the act entailing the responsibility of an international organization should be wrongful under international law posed two difficulties, one relating to the responsibility of States and the other to the responsibility of legal entities under internal law. In the case of the former, it was now acceptable for States to be held liable for their

injurious acts in instances not prohibited by international law, and the Committee was endeavouring to draft articles to that effect. The same could also apply to international organizations, since acts undertaken by them that were not prohibited by international law might nevertheless cause injury to States or individuals, thus giving rise to the question of liability and of whether the same rules that obtained for State liability should apply. Those draft articles, however, made no provision for the various legal theories concerning no-fault liability that were frequently echoed in the internal laws of many States. Where injury resulted from the proper conduct of an international organization and it was subsequently found that the justifications for such conduct were improper or illegal, it was only fair that the organization concerned should be held responsible for its action.

68. The topic of responsibility of international organizations gave rise to complex legal issues that should be thoroughly explored in order to produce carefully balanced wording on the subject. That same subject had been raised with the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization in connection with the right of a State to compensation for injury arising out of an act or decision of an international organization. In the same way, his delegation felt that the Commission should devote due attention to ensuring that the draft articles addressed the concerns of various States on a topic of such importance.

69. **Mr. Buchwald** (United States of America) said that the issue of responsibility of international organizations was complex, since such organizations varied greatly in their functions and structure. That made it difficult to define "international organization" for the purpose of developing and applying a set of articles or rules.

70. One of the issues under consideration concerned the differences between States and international organizations and it was important that such differences be kept in mind as work proceeded. For example, the relationship between an individual and his country of nationality was significantly different from that between an individual and an international organization that employed him. That raised the issue of the extent to which it was appropriate to make analogies between principles of attribution and responsibility applicable to States and those applicable to international organizations.

71. His delegation intended to submit written views on the scope of the Commission's study, the possibility of a necessity defence for international organizations, and the responsibility of international organizations for State actions requested or authorized by an international organization. Particular emphasis should be placed on relevant practice. The Commission should avoid developing rules in the area of international organizations that merely paralleled the rules set forth in the draft articles on State responsibility. Instead, it should carefully assess the unique considerations relevant to international organizations.

72. On the topic of shared natural resources, there was still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice varied widely. His delegation considered that context-specific arrangements were the best way to address pressures on transboundary groundwaters, and would favour a final form that gave States flexibility to tailor agreements or arrangements to suit their circumstances, such as guidelines that could be used to negotiate bilateral or regional arrangements.

73. **Mr. Pecsteen** (Belgium), referring to the questions posed by the Commission to member States (A/59/10, para. 25) said, in answer to question (a), that the responsibility of international organizations vis-à-vis their member States should not be dealt with as such in the context of the current study. The issue fell within the purview of international civil service law and it would be difficult to deal with it without becoming involved in a much more complex task of codification. However, the general rules identified by the Commission with regard to the responsibility of international organizations, particularly in relation to individuals, could apply, mutatis mutandis, to the relationship between an international organization and its agents.

74. The relationship between an international organization and its member States was more complex. It was difficult to draw an exact line between the responsibility of an international organization vis-à-vis a member or a non-member State, or another international organization, and the responsibility of an international organization vis-à-vis its members alone, whether States or international organizations.

75. If the responsibility of an international organization vis-à-vis its members was limited to problems relating to the internal rules of the international organization, that aspect could be excluded from the draft articles. However, it was not easy to delimit the internal rules of an international organization. Thus, implementation of the decisions of an international organization could be a matter both of its internal rules and of general international law. Nevertheless, if an act of an international organization violated a rule of international law, which existed independently of the internal rules of the international organization, the matter entered into the scope of the Commission's study.

76. With regard to question (b), the draft articles on responsibility of States identified "necessity" as a circumstance precluding wrongfulness, when the act not in conformity with an international obligation of the State was the only way for the State to safeguard an essential interest against a grave and imminent peril (art. 25). Evidently, "essential interest" was more easily understood in the case of States than of organizations. However, James Crawford had noted that what constituted an essential interest could not be defined in the abstract and a priori; all the circumstances of the case had to be taken into account in order to evaluate the "essential" nature of the interest to be protected by failing to comply with a specific international obligation. Understood in that way, there was no reason to preclude an international organization from invoking the protection of a similar interest to justify failure to comply with an international obligation.

77. Circumstances precluding wrongfulness appeared to have been embodied in numerous European Community bilateral cooperation agreements. Such agreements provided for the possibility of adopting safeguard measures, involving a failure to respect the terms of the agreements, if serious disturbances occurred in a sector of economic activity or if difficulties arose that could result in the deterioration of the regional economic situation. That one of the parties to the agreements in question was an international organization, rather than a State, did not appear to change anything. Consequently, there appeared to be no specific reason for excluding the possibility of international organizations invoking "necessity" as a circumstance precluding wrongfulness, on the understanding that it should be subject to the same requirements as those established for States.

78. Question (c) was somewhat ambiguous and could cover several very different situations. It appeared advisable to formulate the question more precisely, with examples of the type of situation envisaged.

79. **Mr. Troncoso** (Chile), referring to the topic of diplomatic protection (A/59/10, chap. IV), said that his delegation supported the Commission's approach to the draft articles, namely, dealing with the secondary rules and not the primary rules. His delegation agreed that the draft articles should refer to the conditions that must be met in order to bring a claim for diplomatic protection, and that the topic of protection should be considered in relation to both natural persons and legal persons. Furthermore, the draft articles should be limited to diplomatic protection and should not deal with so-called "functional protection", which referred to agents of an international organization.

80. His delegation approved of draft article 1 on the definition and scope of international protection and agreed that the draft articles should not seek to describe internationally wrongful acts giving rise to diplomatic protection. It was particularly relevant to stress, in draft article 2, that diplomatic protection was vested in the State and was therefore a discretionary act of the State. Although that idea was clearly stated in the commentary, the article tended to emphasize the way protection should be exercised rather than the fact that it was a State prerogative.

81. Although the expression "continuous" nationality appeared in the title of draft article 5, it did not appear in the text, which stated only that a person should be a national of the country providing protection on two occasions: when an injury occurred and when the claim was presented. Although the Commission suggested that it was unnecessary to use the term "continuous", because it would encompassed a very unusual circumstance, the concept was to provide a safeguard against a situation in which a person changed his nationality merely to obtain diplomatic protection from a more influential State.

82. With regard to the exercise of protection in cases of multiple nationality (draft article 6), and specifically to the commentary made by the Commission on the term "jointly" which appeared in paragraph 2, the Commission's view seemed to be that the term allowed States to exercise protection separately or in different forums. That premise would be covered by paragraph 1; consequently, the term "jointly" should be understood strictu senso, namely, as an identical action, as in the case of collective claims or actions.

83. His delegation agreed that a State should be allowed to exercise protection in respect of a stateless person or a refugee. In its commentary, the Commission stated that the term "refugee" was not limited to the category of persons defined in the 1951 Convention Relating to the Status of Refugees. If that was so, it should be stated more firmly in the article.

84. Turning to the topic of unilateral acts of States (A/59/10, chap. VIII), his Government recognized such acts as a source of international obligations. His delegation agreed that the next step could be the elaboration of a draft definition of unilateral acts based on the operative text adopted by the Working Group in 2003, together with the formulation of some general rules for all the unilateral acts and declarations considered by the Special Rapporteur, in the light of State practice. It would also be useful to continue examining State practice with regard to the evolution of the acts and declarations examined in the report, including aspects relating to the author of the act, its form, its subjective elements, the reactions of third States, and its revocability and validity.

85. Even though the elaboration of draft articles establishing a regime applicable to all unilateral acts and declarations could be a very substantial task, the efforts made to date should not be abandoned. If it was not possible to elaborate a draft convention, the Commission could formulate some guidelines for State practice, which would also make a useful contribution to international case law and legal doctrine. Lastly, a new working group could be established to undertake a critical examination of the practice compiled in the seventh report and to establish principles to guide the continuation of the Special Rapporteur's work.

86. The Special Rapporteur on reservations to treaties (A/59/10, chap. IX) intended to deal with the question of the validity of reservations in his next report. The Vienna Conventions on the Law of Treaties covered cases where a State or an international organization could not formulate a reservation to a treaty (art. 19); but they failed to regulate what happened when a State or an international organization formulated a reservation despite that prohibition. His delegation agreed with the Special Rapporteur that a "prohibited" reservation needed to be defined and recommended that he include that task in his forthcoming guidelines.

87. His delegation agreed that the adjective "unlawful" was inappropriate to qualify a reservation; it was prohibited conduct, but normally it would be precluded by other States rejecting the source of the reservation, so that responsibility would not be involved. Nor did his delegation approve of the term "validity", because that referred to the reasons for the nullity, which were not necessarily present in a situation such as the one under consideration, namely, prohibited reservations. There could be invalid reservations that were not prohibited. Thus, there were two separate categories. Moreover, the term "invalid" could be confused with a case in which there was an "invalid" reservation, for example, one formulated by an agent who was not authorized to represent the State for that purpose. Therefore, the term "admissible" or a word with a similar meaning would be more appropriate. However, a further problem could be the determination of whether such inadmissibility could be alleged by the depositary directly or whether it should be alleged by the States under the usual system of individual assessment of reservations.

88. Although, in principle, the enlargement of the scope of an existing reservation and the late formulation of a reservation should not be prohibited, unless there was a treaty provision to that effect, such situations should be considered very exceptional within the law of treaties.

89. The Special Rapporteur's ninth report referred essentially to the definition of an "objection to a reservation"; it would be useful to clarify what was understood by an objection, and its scope. A definition would avoid the possibility of an objecting State causing its objection to have inappropriate effects. It was also useful to make a distinction between an objection, as such, and mere comments on or interpretations of a reservation. An objection could not have the super maximum effect referred to in the text, i.e., that of invalidating or rendering meaningless the will of the entity formulating it. While the super maximum effect was inadmissible, in principle, the Special Rapporteur could examine it in relation to cases where there was a prohibited reservation, whose effects the objector should be able to oppose fully and absolutely; in that situation, there could be a system such as the super maximum effect.

The meeting rose at 4.50 p.m.